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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 77

THE CHASE NATIONAL BANK

vs.

THE UNITED STATES.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIÆ AND BRIEF.

L. L. HAMBY.

( )

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The undersigned represents to the court that he is counsel for the plaintiffs in the case of Martha A. Guettel, et al. *vs.* The United States, No. H-210, now pending in the U. S. Court of Claims and which stands remanded to the general docket thereof to await the action of this Court herein; that the case in which he is counsel involves the construction and validity of the whole of Section 402 (*f*) of the Revenue Act of 1918, the language of which is identical with Section 402 (*f*)

of the Revenue Act of 1921; that counsel for both parties herein have consented in writing to the filing by the undersigned of a brief *amicus curiæ* and their consents have been filed with the clerk of this Court.

Wherefore, the undersigned prays leave to file herein and submit for consideration the within brief *amicus curiæ*.

Two questions have been certified by the Court of Claims. One of them is whether the tax imposed by the final clause of Section 402 (*f*) of the Revenue Act of 1921 on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is a direct tax on property and void because not apportioned; and the other is whether the amount of tax imposed resulting from the inclusion in the gross estate of the insured bears such an unreasonable relation to the subject matter of the tax as to render it void. As to the first of these questions the query relates to life insurance policies payable to beneficiaries "other than the decedent or his estate." The import of the language "other than the decedent" seems obscure since no insurance can be payable to the decedent in any event, nor is insurance payable to the insured during his lifetime subject to the tax by any provision of the statute. It is assumed, therefore, that the Court of Claims intended the question to relate to insurance policies payable to beneficiaries other than *the executor* of the estate of the decedent.

The Statute Involved.

The statute is the Revenue Act of 1921 (42 Stat., 227), which in so far as it materially affects the questions at issue, provided as follows:

> "Sec. 400. That when used in this title—
>
> "The term 'executor' means the executor or administrator of the decedent, or, if there is no executor or administrator, any person in actual or constructive possession of any property of the decedent; • • •"
>
> "The term 'net estate,' means the net estate as determined under the provisions of Section 403;
>
> "Sec. 401. That in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403) is hereby *imposed upon the transfer of the net estate* of every decedent dying after the passage of this act, whether a resident or a nonresident of the United States: • • •"
>
> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property, real or personal, tangible or intangible, wherever situated—
>
> "*(a)* To the extent of the interest therein of the decedent *at the time of his death* which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:

> "(*f*) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Section 403 provided for determination of the value of a statutory net estate by deducting various items and an exemption of $50,000 from the value of the gross estate. The tax is measured by certain percentages of this statutory net estate.

Section 408, as far as material, provided in part as follows:

> "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

Section 409, so far as material, provided in part, as follows:

> "That unless the tax is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having

jurisdiction thereof, shall be divested of such lien. * * *

"If insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then * * * the beneficiary shall be personally liable for such tax, and such property, to the extent of such beneficiaries' interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax."

Propositions of Law, and Argument.

There are raised several propositions of law which may be stated succinctly as follows:

I. The tax is imposed only on the transfer of the net estate of the decedent.

II. The amount receivable as insurance was not transferred by the decedent as a part of his net estate.

III. The tax is an excise upon the right to transmit and not upon the right to receive.

IV. The measure of the tax, in so far as it includes the insurance receivable, is unconstitutional.

Each of these four propositions of law will be severally discussed.

I. THE TAX IS IMPOSED ONLY ON THE TRANSFER OF THE NET ESTATE OF THE DECEDENT.

II. THE AMOUNT RECEIVABLE AS INSURANCE WAS NOT TRANSFERRED BY THE DECEDENT AS A PART OF HIS NET ESTATE.

It should be particularly noticed that the measure of the tax is on the value of a *statutory* net estate, which is the difference between the statutory gross estate defined in Sec. 402 and certain deductions therefrom set forth in Sec. 403. The tax is not imposed upon the transfer of the statutory gross estate. It is axiomatic that one must have owned a definite interest in property at or before the time of his death before he can be said to have transferred it by dying.

In respect of insurance, whether it be that receivable, after proof of the decedent's death, by his executors or by his widow, this decedent did not possess at any time during his life, nor did he have any right to, the amount of insurance receivable after his death. The only thing which he possessed at the time of his death or in which he had any right which he could possibly have been said to have transferred was the cash surrender value, if any, of the insurance policies. It would be necessary for the decedent to have surrendered such policies before dying in order that the cash value could be transferred by him as a part of his net estate. If he die without so surrendering them and collecting his interest therein, his right thereto lapses upon his death, and the thing which is receivable after his death is not the cash surrender value of these policies, but an amount the insurance company promised to pay because of his death, after due proof thereof. By entering into the contracts he could not

be said to have transferred property to take effect at or after his death, because he never owned at that time or at any time the amount which the insurance company promised to pay after his death by virtue of the contract.

It is scarcely necessary to state that a contract of insurance is regarded in law as a special contract, not subject to the rule regarding adequacy of consideration as are other contracts. If at the time of entering into these contracts decedent had paid to the insurance company a sum of money equal to the amount receivable as insurance after his death and in the contract the insurance company, in consideration of the payment of this amount, had promised and agreed to pay the decedent dividends or interest thereon during his lifetime and upon his death to pay the principal to his estate or to any designated person, then the amount receivable would be taxable, because it would be the equivalent of a trust created by him to take effect in possession or enjoyment at or after his death, of *property* which *he had placed in the trust*. Provision is made for taxing such a transfer in paragraph (*c*) of Sec. 402, but in contracting for insurance of this character known as "straight life insurance" one does not place property which he owns in trust. The insurance company does not agree to pay after his death any part of those premiums which he may have paid to the insurance company during his lifetime. It pays after his death something entirely different—something he never owned. But for the beneficent principle underlying insurance a contract of insurance would be

void as a wagering contract. As a matter of fact, to the extent of any insurance payable to one who has not an insurable interest in the life of the insured the contract is void except in a case where the policy is assigned to a creditor for a valuable consideration and only to that extent.

A marked difference between insurance contracts and other contracts is that before a contract can be one of insurance it must be based upon a risk. The maxim "If there be no risk there is no insurance" has always been used to determine the nature of the contract, for there is no consideration moving from the insured to the insurer at the time of the contract equal to the amount of the insurance provided for. Except for the risk involved, making the contract one of insurance, such contracts would ordinarily be subject to cancellation for inadequacy of consideration in any case where the insured failed to live long enough for the insurer to receive a fair consideration for his promise.

Life insurance contracts are not assurances for a single year with the privilege of renewal from year to year on payment of stipulated premiums, but are entirely contracts for life, subject to forfeiture by failure to perform the condition subsequent as to payment of an annual premium. (McMaster v. New York L. Ins. Co., 183 U. S., 25.)

Each policyholder in any insurance company, whether mutual or not, has an associated relation whereby he is interested in the engagements of all, as out of the co-existence of many risks arises the law of

average, which underlies all contracts of insurance. (New York L. Ins. Co. *v.* Statham, 93 U. S., 24.)

The fact that one may insure his own life but cannot assign the policy to another as a cover for a wager policy is the best proof that the engagement does not vest in him property, to the extent of the insurance contracted for, to be dealt with as he pleases (Aetna Life Ins. Co. *v.* France, 94 U. S., 561; Crotty *v.* Union Mutual Life Ins. Co., 144 U. S., 621).

In the case of Phœnix Mutual Life Ins. Co. *v.* Bailey, 13 Wall. 616, a policy of life insurance is defined to be not necessarily a contract merely of indemnity for pecuniary loss, as is that of marine and fire insurance, but it is sufficient if one has an insurable interest in the person insured at the inception of the contract and it has appeared that the stipulated event has happened which renders the insurance payable.

The amount receivable in insurance is much the same as the amount recoverable after one's death because of his death through the wrongful act of another. In such a case the only interest of decendent at the time of his death was the right to sue for injury done him by the wrongful act of another. If he failed to live until he should recover in the action, his suit upon his death would immediately abate, for his death ends any right he had. After his death his executor or administrator or his next of kin in some jurisdictions may maintain an action, not by reason of any interest or right which the decedent had at the time of his death or during his lifetime, but wholly by reason of his death, to recover indemnity therefor. As an illustra-

tion—one who is injured by the wrongful act of another in the District of Columbia can maintain a suit for any amount without limitation for the injury he has sustained. If he should die before recovering a judgment, the action abates. His executor or administrator only for his next of kin, who must be specifically named and shown to be his next of kin, may maintain a suit against the tort feasor, not for any injuries to decedent, but for causing the death of the decedent; and he is limited both in his action as well as in his right of recovery to $10,000, regardless of the loss sustained by the next of kin through the untimely death of the decedent. The thing, therefore, which his estate or his next of kin receives is nothing that the decedent transmitted as a part of his net estate, for it was not anything in which he had any right of property during his lifetime. No attempt has ever been made, nor could any be successfully made, to measure the transfer of one's net estate by including an amount so received after his death, which in its very nature is not the thing which the decedent ever possessed or had a right to during his lifetime. So it is with insurance. The thing receivable after death of the insured is not a thing which the decedent possessed or had any right to at any time during his life and which he could himself transfer.

Another striking illustration of a nontransferable interest arises where the decedent, during his lifetime, was the owner of a life estate in any property. Upon his death his estate or interest abates and he transmits from himself no interest in property to anyone else.

It is true that it requires his death before the remainderman may take the remainder, but the interest which the remainderman takes is not the interest which the life tenant had and transmitted from himself to the remainderman. The remainderman takes his interest by virtue of some antecedent authority. In the same way insurance receivable after decedent's death is not a thing which the decedent had and transmitted from himself by dying. As in the case of the life estate, it required the decedent's death before the beneficiary could get possession of the insurance, but the beneficiary acquires it through some antecedent authority. Neither in the case of insurance receivable nor estates in remainder does the ownership of property originate and come from either the insured or the life tenant. In the one case it arises by virtue of a contract and is payable wholly by an insurance company out of its own funds. In the other case the title springs from an original grant of some other person whereby the life tenant receives his particular estate created by someone else out of property which the life tenant did not own.

Article 12 of Regulations 37, revised 1919, relating to estate tax, promulgated by the Treasury Department under the Revenue Act of 1918, expresses clearly the kind of property upon which the taxe is imposed, as follows:

> "Article 12. Character of Interests Included. This provision is designed to include all property interests of the decedent, of whatever character. It is the commonest form of taxable

transfer. As a basis for tax, there must be an actual beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate. The statute also includes only property rights *existing in the decedent in his lifetime and passing to his estate*. It consequently does not include a right which came into existence *only after the decedent's death*, such as a cause of action by statute for causing the death. The proceeds of such a cause of action should not be included in the gross estate, whether payable generally to the estate or to some specified class of persons, such as the widow or children.

"The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included *on account of a life estate in the decedent*. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent. For rules as to valuing such annuities and illustrations, see Article 20."

Attention is invited to the fact that the Revenue Acts of 1921, 1924 and 1926, following the Revenue Act here under consideration, differs therefrom in the lan-

guage used in imposing the tax. The 1918 Act imposes the tax upon the transfer of the actual net estate of the decedent and measures it by a statutory net estate. The subsequent acts impose the tax upon the *statutory* net estate and measure it by the *statutory* net estate. This has been accomplished in a way not easily discernible, thus: The language of Section 401 of the 1918 Act, which imposes the tax, is not different from the language of the same sections of the subsequent acts which impose the tax; but in the subsequent acts it will be found that there has been inserted, in the section *defining terms used*, that the term "net estate" means the statutory net estate. This will be found in Section 400 of the 1921 Act, in Section 300 of the 1924 Act, and in Section 300 of the 1926 Act, but it will not be found in Section 400 of the 1918 Act.

III. The Tax is an Excise upon the Right to Transmit and not upon the Right to Receive.

The tax imposed by this act is not based upon any legacy or thing that any person receives, whether he be as individual or *nominee* or the executor or administrator, but is based solely upon the right of an individual to transmit from himself an interest in property by the act of dying. On the other hand, a legacy or an inheritance tax is in terms based upon the receipt by anyone of an interest in property passing to him either by the will of a person who has died, or inherited by or distributed to him by virtue of the intestate laws of the State.

In the case of Fidelity Trust Company *v.* McCaughn, held that the estate tax imposed by the Revenue Act of 1918 is not a tax on succession and receipt of benefits under the intestate law or a will, but is an excise on the transfer of an estate on the death of the owner.

In the case of Fidelity Trust Company *v.* McCaughn, 17 Fed. (2d), 605, it is held that the word "interest" used in Section 402 of the Revenue Act of 1918, for the purpose of determining the tax by virtue of the passing of the decedent's property, means the use of the *physical thing* as well as an *estate therein.*

A clear distinction between estate and inheritance taxes is set forth in the case of Frick *v.* Lewellyn, 298 Fed., 803.

To the same effect is the case of Frew *v.* Bowers, 12 Fed. (2d), 625, which holds that the estate tax under the 1921 Act is an excise on the right or privilege of transmitting property from a decedent and not on the right or privilege of receiving it.

But the tax in this case is based solely upon the right of a person dying to transmit property, and the insurance which was receivable in this case was receivable only by virtue of *a contract* which imposed a liability upon *an insurance company* which had assumed the risk on this decedent's life. Such insurance, therefore, to the extent of the amount receivable, either by the executor or by a widow, is not transferred by a decedent as a part of his net estate. We often hear it said that a man left little or no estate but left considerable insurance.

Subsequent to the passage of the 1921 Act, the Treasury Department issued Regulations 63, under the Revenue Act of 1921, and in Article 1 thereof it has placed its executive construction upon the meaning of Section 401 of the said act as follows:

> "Article 3. Neither a Property nor a Legacy Tax.—The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer *from the decedent* to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs."

It will be seen that the Department's own construction of this act is that it contemplates a tax upon the transfer of property from the decedent to others and that it bears no relation to an individual inheritance tax. Is the amount of insurance receivable after decedent's death under contracts of insurance over property which the decedent owned and which he transferred? It cannot be, for he not only never owned such amount, but the contracts specifically provided that he should never own it.

IV. The Measure of the Tax in so far as it Includes the Insurance Receivable is Unconstitutional.

At the outset it should be borne in mind that to whom the insurance company pays the amount of insurance is wholly immaterial, since Section 401 imposing the tax admittedly bases it, not upon the receipt of property, but upon its transmission by the decedent at the time of his death. The fact that the insurance may be payable to the executor does not render the amount so paid any more the property of the decedent at the time of his death than if the amount were paid to some member of his family not his executor; otherwise it would be a tax on the right to receive and not on the right to transmit.

Obviously one takes out insurance, not in order to enrich himself and thus acquire property, but quite the reverse because he may not have property to transmit. In order to impose a tax supposed to be upon the transfer of the net estate it is proposed to measure the tax not only by the transfer of the only property one is capable of transferring, but by adding thereto that which he never had and never could have had and therefore never transferred. It is included only, as the statute says, because it is *receivable* by some one after his death, by virtue of a contract entered into in his lifetime. The statute makes no pretense of including it in the gross estate as a *transfer* by him.

We concede that Congress has the constitutional power to impose an excise upon the event of the taking

out of an insurance policy measuring the tax by the amount of the insurance. Likewise we concede authority to impose an excise on an insurance company based upon the event of issuing a policy of life insurance to be measured by the amount of the insurance.

It may be lawful also to impose an indirect tax upon the right to receive proceeds of an insurance policy regardless of who was the insured, the tax to be payable by the beneficiary and measured by the amount of insurance. But the tax here involved is (*a*) upon the right of a person dying to transmit his property to the living (Sec. 401); and it is at the same time a tax upon one who receives insurance (Secs. 408-409). While a separate excise on insurance received, measured by the amount thereof plus any other property the *recipient* may happen to have at that time might operate uniformly, it would be extremely arbitrary, if not a direct tax on the other property. But an excise upon the event of receiving insurance measured by the amount thereof plus the amount of property *some one else* may happen to have possessed at death, and, by dying, transmitted to another, or others, is arbitrary beyond the realms of reason, if not a direct tax on the other property.

I doubt seriously if Section 402 (*f*) would operate with the geographic uniformity contemplated by the Constitution in respect of the levying of indirect taxes. Suppose "A" took out a policy of insurance in the amount of $100,000, which, after his death, was receivable by his widow and that at the time of his death he had no property and transmitted no net estate.

Under the statute $60,000 of this insurance would be included in his gross estate and as there is an exemption of $50,000 there would be a tax on the $10,000 remainder payable in its entirety by his widow as the decedent had no property. Suppose "B" at the same time took out a similar insurance policy and after his death his widow received $100,000 and that "B" left no property at his death but owed debts in the amount of $10,000. $60,000 of the insurance would be included in his gross estate but after deducting his indebtedness of $10,000 and the specific exemption of $50,000 his estate would not be taxable and his widow would pay no tax, nor would she have to pay any of the debts. In the one case a tax is imposed upon one widow where a man transmitted no property by dying and no tax would be paid by the other widow where her deceased husband transmitted no property by dying, and in each case the widow received the same amount of insurance.

As a matter of fact, under the provisions of this act if a man should die possessed of no property, but sometime before his death had taken out insurance for the benefit of his family, his estate as well as the beneficiaries of the insurance would be liable for the full amount of this tax although the insured transmitted no net estate when he died and although the beneficiary of the insurance received the amount of the insurance not by virtue of any transfer from the decedent, but by virtue of some antecedent authority.

It must be conceded that generally speaking one takes out ordinary insurance not for his benefit but for the protection of those dependent upon him because

he may not have any or a sufficient net estate to transmit to them when he dies. Even though one may possess considerable property he may still contract for insurance for the benefit of his dependents, for he is subject to be sued for damages; or he may lose in investments; or his property may be stolen or destroyed, and thus that which belonged to him may be wiped out some day so that he could not transmit a net estate.

To extend the argument logically, the provisions of this act are tantamount to the imposition of a tax upon the transfer of a man's net estate measured by the value not only of his net estate, but that plus the value of any property which the recipients of his net estate may happen to possess in their own right at the time of his death.

In the celebrated case of Knowlton *v.* Moore, 178 U. S. 41, *47*, the Supreme Court says:

> "Direct taxes bear immediately upon persons, upon the possession or enjoyment of rights, indirect taxes are levied upon the happening of an event or an exchange."

The event, the generating source creating the right to receive insurance, happens at the time the contract therefor is entered into. The presentation of due proof of death of the insured may be the event required to happen before the beneficiary may gain possession of the insurance, but neither that event nor the event of the insured dying and transmitting a net estate is the generating source or the event by which the insurance is created or transmitted. As heretofore shown,

one may have a life estate in property and it may require his death before the remainderman may actually receive his estate in remainder, but the generating source of the remainder is not the event of the life tenant dying and transmitting a net estate, but it is the deed which created the title in the remainderman.

Contracts of insurance are not subject to any direct or indirect tax when they are taken out. That the insured subsequently dies and at that time happened to transmit a net estate having nothing whatever to do with the contract of insurance, does not furnish authority retrospectively to impose a tax upon this past event payable by some one other than the contracting parties and measured not alone by the amount of the insurance, but by the amount of property which the insured happened to have possessed at the time of his death.

In short, if this tax is good as an indirect tax upon the insurance, it is necessarily a direct tax on the other property by which it is measured; and conversely, if this tax is good as an indirect tax on the transfer of the decedent's net estate, it is a direct tax on the amount of insurance by which it is measured.

Respectfully submitted,

L. L. HAMBY.